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This action is an appeal from the Judgment of the Honorable Edith Messina, Circuit Court of Jackson County, Missouri, Division 12, entered on September 8, 2003, denying Plaintiff's request for declaratory judgment and injunctive relief regarding whether Plaintiff had a duty to register under the Sex Offender Registration Statutes, RSMo. §589.400 *et seq*. The effect of the Court's ruling is that Missouri Statutes RSMo. §589.400-§589.425 are constitutional and applicable to Plaintiff. Consequently, Plaintiff is required to register as a sexual offender with the chief law enforcement officer of the county or face prosecution for the Class A misdemeanor of Failure to Register, pursuant to RSMo. §589.425.

Plaintiff challenges the constitutionality of the Sex Offender Registration Statutes, and Plaintiff claims the Trial Court's application of these statutes to him constitutes an impermissible *ex post facto* law. Specifically, Plaintiff claims that he should not have to register as a sex offender because his sentence for the underlying sex offense was a suspended imposition, which he maintains is a "closed record" under RSMo. §610.105, also known as the "Sunshine Laws."

Thus, the appeal herein involves the validity of a statute and a provision of the constitution of this state. According to Article V, Section 3 of the Missouri Constitution, the Missouri Supreme Court has exclusive appellate jurisdiction in cases of this nature.

STATEMENT OF FACTS

Plaintiff R.W. pled guilty to a sex offense on March 30, 1994. He pled guilty to sexual assault in the first degree in exchange for a suspended imposition of sentence of five years probation. (T. 6)[1] The crime to which he pled guilty involved a child. During his probation, as a condition of his probation, he registered as a sex offender as required by RSMo. §589.400 *et seq.* (T. 7-8).

Upon release from probation, Plaintiff failed to continue to register as a sex offender as required by the statute. The Jackson County Sheriff's Department contacted him directly requesting that he register as required by the law. (L.F. 13-14). Plaintiff refused to register claiming that the application of the Sex Offender Registration Statutes to him constituted an *ex post facto* law. Specifically, he claimed a conflict existed between his right to privacy due to his suspended imposition of sentence and the registration requirement in the Sex Offender Registration Statutes. (L.F. 15-16).

Plaintiff filed a petition for declaratory judgment and injunctive relief. Plaintiff's petition sought injunctive relief to prevent the Jackson County

[1] The parties will be referred to by their Trial Court denominations or their names. References to the Trial Transcript will be as follows: (T. _). References to the Legal File will be as follows: (L.F. _). References to the Supplemental Legal File will be as follows: (Supplemental L.F. _). References to Appellant's Brief will be (Appellant's Brief, _).

Sheriff and the Jackson County Prosecutor from enforcing the registration requirement and criminal penalties set forth in the statute for failure to register. Judge Edith Messina held an evidentiary hearing in the matter and heard testimony from Plaintiff. (T. 3). Plaintiff testified that he pled guilty on February 9, 1995 and received a suspended imposition of sentence. (T. 6). There is no factual dispute in this case that the conduct of pleading guilty to the sex offense is a triggering event that requires registration under the terms of the Sex Offender Registration Act.

After testimony and arguments of counsel, Judge Messina denied the request for declaratory and injunctive relief. (T. 34). Judge Messina prepared a written Judgment dated September 8, 2003. Thereafter, Plaintiff filed a Notice of Appeal to the Supreme Court of Missouri basing jurisdiction on his assertion that the validity of a Missouri statute is at issue in this case. (L.F. 49).

Factual Background of the Missouri Sex Offender Registration Statutes

The Missouri Sex Offender Registration Statutes, RSMo. §§589.400 *et seq*., have two parts. The first part is an overall statement of applicability indicating those persons who must potentially be registered. The second part describes who must take action to register and when that duty ripens into a statutory requirement. The Missouri Legislature first enacted this statute in 1994 and has modified it since then. The initial version took effect in 1995. Basically, the statute requires persons who have done certain triggering acts, such as pleading guilty or being found guilty of a sex offense, to register with the chief law

enforcement officer in the county. The statute has been revised several times to add certain offenses which are triggering acts for registration and to change the time in which to report from fourteen to 10 days.

Following this Court's ruling in *J.S. v. Beaird*, 28 S.W. 3d 875 (Mo. banc 2000), the Sex Offender Registration Statute was modified to clarify to whom the statute applied. Under the modification, anyone who committed one of the triggering events that was not otherwise registered in the county of their residence had ten (10) days in which to register with the chief law enforcement officer of the county. The final modification thus far occurred in 2003 when school law enforcement agencies were added to those who can benefit from the registration list. Also new is the requirement that individuals who must register have to disclose their enrollment or employment in any institution of higher education. §589.407 R.S.Mo. 2000 (Cum. Supp. 2003). The statute contains no express declaration of its legislative intent, purpose or objective.

Registrants must complete a form which includes, but is not limited to a statement, signed by the registrant, giving his or her name, address, Social Security number, phone number, place of employment, enrollment within any institution of higher education, the crime requiring registration, whether the registrant was sentenced as a persistent or predatory offender pursuant to RSMo. §558.018, the date and place of conviction or plea regarding the crime, the age and gender of the victim at the time of the offense, whether the registrant successfully completed the Missouri sexual offender program, and the fingerprints and

photograph of the registrant. While much of the information collected is available only to courts, prosecutors and law enforcement agencies, any person may request a list of the names, addresses, and crimes for which offenders are registered from a county's chief law enforcement official. §589.417 R.S. Mo. 2000 (Cum. Supp. 2003).

Once registered, all registrants are required to annually report in person in the month of their birth to the county law enforcement agency to verify the information given in their registration statement. If working or attending school or training out of state, Missouri registrants are required to report to the chief law enforcement officer in the area of the state where they work or attend school or training and register in that state. §589.414.7 RSMo. 2000 (Cum. Supp. 2003). If an offender is registered as a predatory or persistent sexual offender, if the victim was less than eighteen years of age at the time of the offense, or if the offender is found guilty of failing to register or submitting false information when registering, he or she must report in person to the county law enforcement agency every ninety days to verify the information given in their registration statement. §589.414.5(1)-(3) RSMo. 2000 (Cum. Supp. 2003). Additional reporting requirements can be triggered by various changes of circumstances specified in the subject statute. There is a lifetime registration requirement unless the convictions for the offenses requiring registration are reversed, vacated or set aside or unless the registrant is pardoned.

The Missouri Sex Offender Statutes contain no specific language that exonerates a person from the obligation of registration who has completed probation but otherwise meets the criteria for registration. Rather, the specific language of the statute requires **any person** who has pled guilty to or been convicted of one of the enumerated offenses or committed one of the triggering actions after the start date in the statute to register. §589.400.1 2000 (Cum. Supp. 2003). (Emphasis added). No exceptions or exemptions exist in the statutes for persons who received suspended imposition of sentence or any other form of probation or parole. No exceptions or exemptions exist for those who are living peacefully and in a law-abiding manner. Those who meet the criteria set forth in the statute must register.

POINTS RELIED ON

II. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFF IN HIS PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF THE MISSOURI SEX OFFENDER REGISTRATION STATUTES, MO. REV. STAT. §§589.400 - 589.425, TO PLAINTIFF DOES NOT DENY HIM DUE PROCESS OF LAW UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS IN THAT HE HAS ALREADY RECEIVED THE DUE PROCESS TO WHICH HE IS ENTITLED UNDER THESE CIRCUMSTANCES.

SOURCES:

Connecticut Department of Public Safety, et al v. John Doe, 538 U.S. 1 (2003).

State v. Larson, 79 S.W. 3d 891 (Mo. banc 2002).

State v. Meggs, 950 S.W. 2d 608 (Mo. App. 1997).

State v. Acton, 665 S.W. 2d 618 (Mo. banc 1984).

III. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFF IN HIS PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF THE MISSOURI SEX OFFENDER REGISTRATION STATUTES, MO. REV. STAT. §§589.400 - 589.425, TO PLAINTIFF DOES NOT CONSTITUTE AN IMPERMISSIBLE *EX POST FACTO* LAW IN VIOLATION OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 9, CLAUSE 3 AND THE MISSOURI CONSITUTION, ARTICLE I, SECTION 13, IN THAT IT IS A CIVIL REGULATORY SCHEME NOT A PUNITIVE ONE.

SOURCES:

Smith v. Doe, 538 U.D. 84 (2003).

J.S. v. Beaird, 28 S.W. 3d 875(Mo. banc 2000).

Kennedy v. Mendoza Martinez, 372 U.S. 144 (1963).

State v. Costello, 643 A.2d 531 (N.H. 1994).

IV. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFF IN HIS PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION ON THE BASIS OF THE DOCTRINE OF EQUITABLE ESTOPPEL BECAUSE PLAINTIFF DID NOT ESTABLISH BY CLEAR AND SATISFACTORY EVIDENCE THAT THE ENFORCEMENT OF THE MISSOURI SEX OFFENDER REGISTRATION STATUTES, MO. REV. STAT. §§589.400 589.425, AGAINST HIM CONSTITUTED AN IMPERMISSIBLE RETROSPECTIVE APPLICATION OF LAW IN VIOLATION OF THE MISSOURI CONSITUTION, ARTICLE I, SECTION 13.

SOURCES:

Resnick v. Blue Cross and Blue Shield of Missouri,
912 S.W. 2d 567 (Mo. App. 1995).

Lake Saint Louis Community Ass'n v. Ravenwood Properties, Ltd., 746 S.W. 2d 642 (Mo. App. 1988).

Corvera Abatement Technologies v. Air Conservation Comm'n,
973 S.W. 2d 851 (Mo. banc 1998).

Cutshall v. Sundquist, 193 F.3d 466 (6th Cir. 1999).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFF IN HIS PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF THE MISSOURI SEX OFFENDER REGISTRATION STATUTES, MO. REV. STAT. §§589.400 - 589.425, TO PLAINTIFF DOES NOT DENY HIM DUE PROCESS OF LAW UNDER THE UNITED STATES AND MISSOURI CONSTITUTIONS IN THAT HE HAS ALREADY RECEIVED THE DUE PROCESS TO WHICH HE IS ENTITLED UNDER THESE CIRCUMSTANCES.

A. INTRODUCTION

The plain wording of the Missouri Sex Offender Registration Statutes provide for registration of individuals who have either pled guilty to or been convicted of an enumerated sex offense. RSMo. §§589.400 – 589.425. According to his own testimony, Plaintiff pled guilty to an enumerated offense before a circuit court in Jackson County, Missouri and received a suspended imposition of sentence. Plaintiff sought equitable relief from the Trial Court from impending criminal prosecution by the county prosecutor after he failed to register with the county sheriff, stating that the fact that his court proceeding was a "closed record" under the

Missouri Sunshine Laws contained in RSMo. §610.105 excused him from the duty to register because he was not "convicted" of a sex offense. The trial court properly denied his request for equitable relief since he pled guilty and is therefore subject to the requirement to register under the plain language of the Sex Offender Registration Statute. The Trial Court correctly recognized that the plain meaning of this statute made it apply to Plaintiff.

B. STANDARD OF REVIEW

The appellate review of suits which are equitable in nature is governed by the standard established in *Murphy v. Carron*, 536 S.W. 2d 30, 32 (Mo. banc 1976). On review of a case tried by the court without a jury, the appellate court only overturns the judgment of the trial court if there is no substantial evidence to support the judgment, the judgment is against the weight of the evidence or the trial court's judgment erroneously declares or applies the law. *Murphy v. Carron*, 536 S. W. 2d 30, 32 (Mo. banc 1976). Similarly, the denial of a petition for declaratory judgment and injunctive relief is to be reversed if there is no substantial evidence to support the court's determination, if the judgment is against the weight of the evidence, or if the judgment erroneously declares or applies the law. *Opponents of Prison Site, Inc. v. Carnahan,* 994 S.W. 2d 573 (Mo. App. 1999); *State Highway Comm'n v. Finch*, 664 S.W. 2d 53 (Mo. App. 1984).

Statutes are presumed to be constitutional and will be found unconstitutional only if they clearly violate a constitutional provision. *State*

v. Brown, 660 S.W. 2d 694, 699 (Mo. banc 1983); *State v. Mahurin*, 799 S.W. 2d 840, 842 (Mo. banc 1990). "A statute must be interpreted to be consistent with the constitution of the United States if at all possible. *Herndon v. Tuaty*, 857 S.W. 2d 203 (Mo. banc 1993). This rule of construction is also applicable to the Missouri Constitution. *State Highway Commission v. Spainhower*, 504 S.W. 2d 121, 125 (Mo. banc 1973).

Any doubts concerning the constitutionality of the statute will be resolved in favor of validity. *State v. Young*, 695 S.W. 2d 882, 883 (Mo. banc 1985). Additionally, the burden of persuasion on the issue of the statute's validity falls squarely on the party challenging the statute. *State ex rel. Mathewson v. Election Commissioners*, 841 S.W. 2d 633 (Mo. banc 1992). On his claims utilizing the doctrine of equitable estoppel, Plaintiff bears the burden to establish his eligibility for that extraordinary remedy by clear and satisfactory evidence. *Capital City Water Company v. Mo. Public Service Comm'n*, 850 S.W. 2d 903 (Mo. App. 1993).

C. DISCUSSION

1. Due Process Analysis

The fact that Plaintiff is legally obligated to register as a sex offender under the Missouri Sex Offender Registration statutes does not deprive him of any liberty interest nor any putative constitutional right to privacy for which he must be accorded more due process of law than that which he has already received. Plaintiff received the due process to which he was entitled

when he entered his plea of guilty to the sex offense triggering his obligation to register on Missouri's registry. The Missouri Sex Offender Registration statutes, like many others throughout the nation, base the obligation to register upon the fact of commission of certain previous conduct, namely conviction of or pleading guilty to a sex offense. At the time of the guilty plea or the conviction, sufficient procedural safeguards were in place to satisfy the demands of due process. No further process is due.

In the recent case of *Connecticut Department of Public Safety, et al v. John Doe*, 538 U.S. 1;123 S. Ct. 1160 (2003), the United States Supreme Court had the opportunity to review a due process challenge to the Connecticut Sex Offender Registration statute. The analysis espoused in that case is controlling herein. The ultimate fact determining if one has to register under the Connecticut law is whether or not one is convicted of a sex crime. Since the plaintiff in the case had a procedurally safeguarded opportunity to challenge the fact of his conviction, any further process was unnecessary. *Id*. at 7. It is not problematic that the Connecticut statute groups potentially dangerous and non-dangerous sex offenders into the same registry.

While Missouri has more triggering events that require registration, including **pleading guilty to,** as well as conviction of, a sex offense, each of those events is enveloped in procedural safeguards. As the record in this case demonstrates, Plaintiff was notified of his legal obligation to register at the time of his plea. (Supplemental L.F. 22). Certainly, he could have chosen not to

enter a plea if the fact that it would obligate him to register did not suit him. The procedural safeguard of being notified of this consequence associated with his plea satisfies due process. Such is the holding in *Connecticut Department of Public Safety, et al v. John Doe,* which controls the facts presented here. No further process is necessary other than the determination that an action triggering the obligation to register has occurred. In this case, Plaintiff admits that he plead guilty to a sex offense, at which time he had appropriate due process. The analysis ends there.

2. Statutory Construction

Under the plain language of the Missouri Sex Offender Registration Statute, Plaintiff is obligated to register. It is indisputable that one of the triggering events that legally obligate an individual to register under the statute is "pleading guilty to committing a sex offense." It is also a triggering event to be "convicted of a sex offense." §589.400(1) RSMo. 2000 (Cum Supp. 2003). It is equally indisputable that Plaintiff in this instance pled guilty to committing a sex offense. (Supplemental L.F. 8-14). According to the plain meaning of the statute, Plaintiff must register. There is no need to reach the issue of the constitutionality of this statute under these facts.

Plaintiff devotes a substantial portion of his brief to discussing resolution of statutory construction conflicts. Although Plaintiff may not be "convicted of a sex offense", by virtue of the fact that his suspended imposition of sentence may not yield a conviction, he cannot make a plausible argument that he

did not plead guilty. Much of Plaintiff's argument focuses upon a distinction between a conviction and a suspended imposition of sentence. None of this analysis is pertinent because it is truly a situation of a distinction without a difference. In this case, it is not significant whether a suspended imposition of sentence is considered a conviction because the Plaintiff clearly engaged in other conduct which legally obligates him to register: he pled guilty to committing a sex offense.

The veracity of this point is underscored by the fact that the circuit court judge who accepted his guilty plea advised him of his legal obligation to register by virtue of the fact that he pled guilty. (Supplemental L.F. 22). Plaintiff did not dispute his status as obligated to register by virtue of having pled guilty to a sex offense. In fact, he registered. He registered in open court on the day he entered his plea and again later when directed to by his probation officer. (Supplemental L.F. 22; T. 7-8). Plaintiff understood and accepted his duty to register at that time. Nothing has changed that would make him any less obligated to register now than he was before. No sophisticated analysis is required to determine that the plain meaning of the statute still applies to Plaintiff to require him to register. There are no significant constitutional implications to requiring Plaintiff to register according to the plain meaning of the statute.

Plaintiff suggests that because the words "suspended imposition of sentence" do not appear within the list of acts triggering an obligation to register that there is some legislative intent to exclude suspended imposition of

sentence from the registry. This argument is nonsense. There is no practical way for an individual to receive a suspended imposition of sentence unless they pled guilty and received it as part of a plea agreement or received it from the court after having been found guilty. The acts triggering a duty to register are not organized by the sentences; rather, they are organized by the conduct of pleading or being found guilty. It is the plea of guilty that is operative, not the resulting sentence.

Further, Plaintiff makes much discussion in his Brief regarding his suspended imposition of sentence being a "closed record" under RSMo. §610.105, also known as the "Sunshine Law." Plaintiff delves into assertions of the supposed legislative intent behind suspended imposition of sentence. Plaintiff discusses what he describes as a conflict between two statutes. Under his version, the Sex Offender Registration Statute tries to publicize what the "Sunshine Laws" require to be kept secret. He goes on to describe that the Sex Offender Registration Statutes should yield to the "Sunshine Laws." (Appellant's Brief, 27-45).

None of this discussion has any bearing on the result in this case. Whatever the legislative intent behind suspended imposition of sentence, it does not change the fact that Plaintiff pled guilty, and thereby committed one of the actions that trigger his duty to report to the sex offender registry. There is no conflict between Plaintiff's putative right to keep his suspended imposition of sentence sealed and his duty to register on the sex offender registry. The information to be registered is not the "closed record." No one is opening the

"closed record." The personal information required for the registry is separate and distinct from the "closed record" of the guilty plea resulting in the suspended imposition of sentence. The mere fact that the public realizes only persons who have either been convicted of a sex offense or have pled guilty to a sex offense must register does not mean that Plaintiff's "closed record" is not still closed. Registration is a collateral consequence of the plea agreement which produced the suspended imposition of sentence.

It is clear from this Court's ruling in *State v. Larson*, 79 S.W. 3d 891 (Mo. banc 2002), registration is appropriate when suspended imposition of sentence occurs. That case, like the one *sub judice*, involved a guilty plea resulting in a suspended imposition of sentence. In *State v. Larson*, discussion occurred as to other types of circumstances in which the plea of guilty leading to a suspended imposition of sentence required the individual pleading guilty to have collateral consequences. Registration as a sex offender was one of those listed; guilty pleas are also used to determine the status of prior, persistent and dangerous offenders, despite the fact that the individual may have received suspended imposition of sentence. Another example given therein was a requirement to forward records from a guilty plea to the Missouri state highway patrol or revenue department in the case of an alcohol or drug related driving offense. If Plaintiff's interpretation of the law were correct, the sunshine laws would prevent disclosure in each of these settings and more. Obviously, such is not the case.

It is important to consider what is closed in a "closed record." Under §610.105 RSMo. 2000 (Cum. Supp. 2003), when a criminal defendant receives a suspended imposition of sentence, official records pertaining to that case shall be closed records when such case is finally terminated. (Appellant's Brief, 27). Official records are those of the court and the agencies associated with prosecution. When an individual is required to register under the sex offender statute, he or she supplies the factual information for the registry. Official records are not used. Nothing about registering for the sex offender registry utilizes official or "closed records." Rather, the individual who pled guilty provides firsthand data to be recorded within the registry. The fact that some of the information may be similar in content does not mean that "closed records" have been opened or utilized.

Plaintiff mischaracterizes the situation as one of "conflict between two statutes." (Appellant's Brief, 27) Plaintiff maintains that RSMo. §610.105 requires the records to be closed and RSMo. §§589.400 – 589.425 require the records to be open. (Appellant's Brief, 27). RSMo. §§589.400 – 589.425 do not require the records of the court proceeding to be opened. They require the individual who pled guilty to a sex crime to come forward on a separate and distinct occasion and provide to the county sheriff the information required by the statute to be maintained in the registry or be subject to criminal prosecution for failure to do so. The sex offender registration statutes do not

require any opening of a "closed" court record whatsoever. To the extent the situation is characterized as a conflict, Plaintiff makes an overstatement.

The appropriate inquiry is whether or not the legislature intended in some way to omit from the requirement to register as sex offenders those individuals who pled guilty but received a suspended imposition of sentence as their punishment. Plaintiff argues that the fact the words "suspended imposition of sentence" are not in the precise terms of the legislation itself is some proof that the legislature intended to exempt those who received suspended imposition of sentences from the duty of registration. (Appellant's Brief, 33).

On this issue, it would be instructive to study other statutory schemes in which this issue has been examined. For example, in the case of *State v. Meggs*, 950 S.W. 2d 608 (Mo. App. 1997), the Court of Appeals for the Southern District examined the statute that authorizes enhanced penalties for prior or persistent offenders who are found guilty **or who pled guilty to** a current charge of driving while intoxicated (DWI) in violation of state law. (Emphasis added). That enhancement statute, RSMo. §577.023, allows the punishment to be increased based upon **a prior guilty plea**. (Emphasis added). The defendant in that case objected to his suspended imposition of sentence on a prior DWI being used as an enhancement to his new charge of DWI. That defendant maintained his suspended imposition of sentence did not yield a conviction, and the language of the enhancement statute did not specifically enumerate suspended imposition of sentence as a type of evidence to be used to increase the punishment. He also

maintained that since he had not been informed that his suspended imposition of sentence could be used as an enhancement, he was deprived of due process of law. The similarities to the case *sub judice* are obvious; the resolution is instructive.

In *State v. Meggs*, the appellate court examined the rules of statutory construction to determine the issue. Construction of a statute is a question of law, not judicial discretion. *Delta Airlines, Inc., v. Director of Revenue*, 908 S.W. 2d 353, 355 (Mo. banc 1995). It is the function of the courts to construe and apply the law and not to make it. *Dees v. Mississippi River Fuel Corp*., 192 S.W. 2d 635, 640 (Mo. App. 1946). In construing statutes, the court's primary responsibility is to ascertain legislative intent from the language used, to give effect to that intent where possible, and to consider the words used in their ordinary meaning. *Angoff v. M & M Management Corp*., 897 S.W. 2d 649, 652-53 (Mo. App. 1995). The legislature is presumed to have intended what the statute says. Consequently, when the legislative intent is apparent from the terminology used and no ambiguity exists, there is no need for construction.

The defendant in the *Meggs* case argued that the absence of the words "suspended imposition of sentence" in the statute was an intentional act on the part of the legislature to exclude suspended impositions as a method to enhance the subsequent DWI charge. However, the court refused to read an isolated section of the law, and instead looked to the provisions of the whole law, and its object and policy. *National Advertising Co., v. Highway and Trans. Comm'n*, 862 S.W. 2d 953, 955 (Mo. App. 1993). In RSMo. §577.023.14 there is

no enumeration of suspended imposition as an evidentiary method to enhance punishment; yet, RSMo. §577.023.1 and .2 allow enhancement as a result of having **pled guilty** to a prior DWI.

In such a situation, the canons of construction assist in determining the legislative intent by going beyond the plain and ordinary meaning of the statute. "The ultimate guide is the intent of the legislature; the other rules of construction may be considered merely as aids in reaching that result; and the purpose and object of the legislation should not be lost sight of." *Edwards v. St. Louis County*, 429 S.W. 2d 718, 722 (Mo. banc 1968). In doing so, the statute's history, surrounding circumstances and the problem in society to which the legislature addressed itself should be considered. *Meggs*, *supra* at 611. In considering those factors in the *Meggs* case, the court determined that the legislature was addressing a matter of public concern: the repeat DWI offender. The purpose of the statute is to deter and to punish those who do not heed the deterrence message. The court ruled that when a statute contains a particular phrase that is specially defined, it should be given effect. In the case of the enhancement provisions for DWI contained in RSMo. §577.023, just as with the sex offender registration statute, the act triggering the consequence can be **a plea of guilty**, and it does not require any imposition of sentence. The court gave this phrase controlling effect. This result was so even though the statute was penal in nature.

The same result occurred in *State v. Acton,* 665 S.W. 2d 618 (Mo. banc 1984), despite due process challenges that its retroactive application to that defendant constituted an *ex post facto* law. The same result is mandated with the sex offender registration scheme. Notwithstanding his suspended imposition of sentence, R.W.'s guilty plea triggers his duty to register. This construction is the only appropriate manner in which to reconcile the two statutes.

Defendants have no quarrel with the canons of statutory construction set forth by Plaintiff; however, they respectfully suggest a different outcome. For example, the rule of construction stating that the specific statute controls over the general one is true. However, the two statutes must be on the same subject for this rule of construction to be operative. That is not the case with the Sunshine Law and the Sex Offender Registration Laws. Since they are not "conflicting statutes on the same subject matter" as Plaintiff contends in his Brief, no construction is necessary. (Appellant's Brief, 38-40). The official record of his guilty plea stays a "closed record" pursuant to the provisions of the Sunshine Law, and by virtue of the fact of the guilty plea he made to a sex offense, he is obligated to register as a sex offender on the sex offender registry pursuant to RSMo. §589.400 *et seq*.

There are other statutory schemes that do not distinguish the "suspended imposition of sentence" as a separate category. For example, the gun permit statute, RSMo. §571.090, provides that an individual may receive a gun permit if he "has not pled guilty to or been convicted of a crime punishable by

imprisonment for a term exceeding one year…" RSMo. §571.090 (2) 2000 (Cum. Supp. 2003). From the number of different examples of the type of wording such as is found here, stating that the triggering conduct is either a conviction or a guilty plea, it is clear that the legislature understands that both exist and want to make provisions for either case. This wording recognizes that the conduct of the plea of guilty can disqualify an individual from a gun permit in this statutory scheme just the same way the fact of the conviction can. In this example, while the suspended imposition of sentence would not yield a conviction, the disqualification would still be triggered by his conduct of pleading guilty. The legislature put the trigger of "pleading guilty" into the statutory language to cover the scenario where the sentence does not yield a conviction. Otherwise, wording in the statute about the trigger of "conviction" alone would suffice. The phrase making a guilty plea one of the triggers in these statutes exists in recognition of the fact that, in certain circumstances, individuals receive the status of "suspended imposition of sentence" where they get to avoid some of the collateral consequences of conviction. However, because they pled guilty, they do not get a gun permit, can still have their DWI cases enhanced and must register as sex offenders. The legislature has done this on purpose.

Plaintiff asserts that the obligation to register as a sex offender infringes upon his fundamental right to privacy. (Appellant's Brief, 42). In response, Defendants respectfully point out that Plaintiff has waived this argument by registering previously. This Court need not reach the purported constitutional

issues associated with registration impinging upon Plaintiff's fundamental right to privacy since Plaintiff has waived that right by registering already. (T., 7-8). Plaintiff maintains that that his privacy interests are invaded because registration provides members of the public with access to private information about him of an inflammatory nature. Yet, this argument is disingenuous since it is Plaintiff who put this information before the public by registering previously.

II. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFF IN HIS PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION BECAUSE THE APPLICATION OF THE MISSOURI SEX OFFENDER REGISTRATION STATUTES, MO. REV. STAT. §§589.400 - 589.425, TO PLAINTIFF DOES NOT CONSTITUTE AN IMPERMISSIBLE *EX POST FACTO* LAW IN VIOLATION OF THE UNITED STATES CONSTITUTION, ARTICLE I, SECTION 9, CLAUSE 3 AND THE MISSOURI CONSITUTION, ARTICLE I, SECTION 13, IN THAT IT IS A CIVIL REGULATORY SCHEME NOT A PUNITIVE ONE.

Both the United States Constitution and the Missouri Constitution prohibit *ex post facto* laws. Therefore, it is appropriate to look to federal as well as state law for guidance in this analysis. The Missouri Constitution's provision against *ex post facto* laws is more limited than the more general provision of the United States Constitution. *State ex rel. Nixon v. Taylor*, 25 S.W. 3d 566 (Mo. App. 2000).

A recent United States Supreme Court case to address the issue of *ex post facto* laws in the context of sex offenders registration statutes is *Smith v. Doe*, 538 U.S. 84; 123 S. Ct. 1140; 155 L.Ed. 2d 164 (2003), which examined

Alaska's law. In *Smith v. Doe*, the United States Supreme Court held that Alaska's sex offender registration legislation did not violate the *ex post facto* clause of the United States Constitution. Missouri's sex offender registration scheme is similar to that of Alaska. Therefore, the analysis of *Smith v. Doe* controls here. It utilizes traditional analysis for *ex post facto* claims.

In considering whether a law constitutes retroactive punishment forbidden by the *ex post facto* clause, a court must ascertain whether the legislature meant the statute to establish civil proceedings. If the legislative intention was to enact a regulatory scheme that is civil and non-punitive, the court must further examine whether it is so punitive either in purpose or effect as to negate the legislature's intention to deem it civil. *Smith v. Doe* at 1146. Using this approach, the United States Supreme Court found the Alaska Sex Offender Registration laws to be civil and regulatory in nature; as such, they are not *ex post facto* laws.

In *J.S. v. Beaird*, 28 S.W. 3d 875(Mo. banc 2000), this Court held that the "obvious legislative intent for enacting RSMo. §589.400 was to protect children from violence at the hands of sex offenders." *J.S. v. Beaird*, 28 S.W. 3d 875, 877 (Mo. banc 2000). With regard to sex offenders registration statutes, the legislative purpose of public safety has historically been regarded as a legitimate non-punitive governmental objective. *Kansas v. Hendricks*, 521 U.S. 346,363; 117 S.Ct. 2072; 138 L.Ed.2d 501 (1997). Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil scheme designed to protect the public from harm.

Plaintiff suggests that because another lawyer previously representing the Defendants incorrectly referred to Missouri's Sex Offender Registration Act as penal before the trial court, this Court should find its legislative intent is to impose punishment. (Appellant's Brief, 47). The intention of the legislature in enacting the statute must be determined by examining the whole statute, not by what lawyers say regarding it. Nothing a lawyer could say before a trial court would countermand the pronouncement in *J.S. v. Beaird* that the legislative intent of the statute is to protect children from sex offenders. Presumably, previous counsel for Defendant's was referring to the portion of the law that makes failure to report a Class A Misdemeanor when he described the law as penal.

Using the approach in *Smith v. Doe* would result in the same conclusion for the Missouri Sex Offender Registration Act since the salient characteristics of the two statutes are comparable. The vast majority of federal and state courts confronted with the issue of the validity of sex offender registration statutes have found the laws constitutional.

Examples of federal decisions upholding the constitutionality of sex offender registration laws are as follows: *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (Tennessee Sex Offender Registration and Monitoring Act did not violate double jeopardy, *ex post facto*, bill of attainder, due process or equal protection clauses); *Russell v. Gregoire*, 124 F. 3d 1079 (9th Cir. 1997) (statute showed regulatory not punitive effect so no violation of *ex post facto* clause); *Doe v.*

Pataki, 120 F.3d 1263 (2d Cir. 1997) (neither registration nor notification provisions under New York act inflicted punishment under *ex post facto* clause); *E.B. v. Verniero*, 119 F. 3d 1077 (3d Cir. 1997) (notification under New Jersey Registration and Community Notification Laws did not constitute punishment for purposes of *ex post facto* and double jeopardy clauses); *Artway v. Attorney General*, 81 F.3d 1235 (3d Cir. 1996) (challenge to notification aspects of New Jersey not ripe, but registration requirements do not violate *ex post facto*, double jeopardy, bill of attainder, equal protection or due process clauses); *Roe v. Farwell*, 999 F. Supp 174 (D.Mass.1998) (registration requirements of Massachusetts law not violative of *ex post facto* clause); *Lanni v. Engler*, 994 F. Supp. 849 (D.Mich. 1998) (purpose of law to protect public not punish offenders so not an *ex post facto* law); *W.P. v. Poritz*, 931 F.Supp. 1190 (D.N.J. 1996) (effect of law is not to constitute punishment, so not *ex post facto*.)

State law cases upholding such sex offender registration and notification laws constitutional against *ex post facto* challenges are as follows: *Robinson v. State*, 730 So.2d 252 (Ala.Cr.App.1998) (registration and notification requirements are not punishment; *People v. Castellanos*, 982 P.2d 211 (Ca. 1999) (no legislative intent to punish, and any punitive effect is not so strong as to outweigh remedial intent); *Jamison v. People*, 988 P.2d 177(Colo. App.1999) (intent of statute remedial, not punitive); *Ray v. State*, 982 P.2d 931 (Ida. 1999) (registration act is a collateral consequence of guilty plea); *State v. Torres*, 574 N.W.2d 153 (Neb. 1998) (sex offender statute is a collateral consequence of guilty

plea); *State v. Costello*, 643 A.2d 531 (N.H. 1994) (any punitive effect of registration statute is *de minimis*); *Doe v. Poritz*, 662 A.2d 367(N.J. 1995) (intent clearly remedial in purpose, not punitive); *Commonwealth v. Gaffney*, 733 A.2d 616(Pa. 1999) (law serves non-punitive goals of public safety, and its effect is not so harsh as to render it punishment); *White v. State*, 988 S.S.2d 277 (Tex. App. 1999) (statute not punitive and therefore not an *ex post facto* law); *Kitze v. Commonwealth*, 475 S.E.2d 830 (Va. App. 1996) (registration requirement not penal); *Snyder v. State*, 912 P.2d 1127 (Wyo.1996) (intent not to inflict greater punishment, but to facilitate law enforcement and protect children).

In *Smith v. Doe*, the United States Supreme Court utilized a multi-factor test previously set forth in *Kennedy v. Mendoza Martinez*, 372 U.S. 144 (1963), to consider the issue of whether a statute is punitive or regulatory. *Smith v. Doe*, 538 U.S. 84, 97, 123 S.Ct. 1140, 1153 (2000). *Smith v. Doe* states that certain of the factors noted in *Kennedy v. Mendoza Martinez* are useful to consider in this context. They are as follows: whether the regulatory scheme has been regarded in our history and traditions as a punishment; whether it imposes an affirmative disability or restraint; whether it promotes the traditional aims of punishment; whether it has a rational connection to a non-punitive purpose; or whether it is excessive with respect to this purpose.

Obviously, this Court should evaluate the constitutional challenge to Missouri's sex offender statutes within this framework. The legislative history of the statutes indicates Missouri sought to comply with federal crime

prevention mandates by enacting this legislation. This Court previously announced that the "obvious legislative intent for enacting RSMo. §589.400 was to protect children from violence at the hands of sex offenders." *J.S. v. Beaird,* 28 S.W. 3d 875, 877 (Mo. banc 2000). Therefore, its legislative purpose should be viewed as protection of children and preservation of public safety.

Using the framework from *Smith v. Doe*, this Court should inquire whether registration such as is required by RSMo. §589.400 has historically been regarded as punishment. Plaintiff argues that the application of the law to him is punishment in that it violates his privacy by placing stigmatizing information into the public that would not otherwise be there, and it restricts his freedom by requiring him to reappear in person frequently. However, in *Smith v. Doe,* the Court explained how shaming or stigmatizing punishments are dissimilar from registration schemes. Historical shaming punishments such as stocks, pillories and branding were designed to do more than provide information. Specifically, they were designed to punish and required the physical participation of the offender. *Smith v. Doe, supra* at 98-99.

By contrast, registration or notification occurs after the sex offender has been punished. *Russell v. Gregoire,* 124 F.3rd 1079 (9th Cir. 1997). The dissemination of information regarding criminal conduct, without more, is not punishment when done to advance a legitimate government purpose or objective. *E.B. v. Verniero,* 119 F. 3rd 1077 (3rd Cir. 1997). For the most part, stigmatization occurs as a result of dissemination of accurate information about a criminal record,

much of which is public. In contrast to the traditional forms of punishment, registration does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

Consideration should be given to whether the Missouri Sex Offender Registration statutes serve the traditional deterrent and retributive aims of punishment. Certainly, it is conceivable that some individuals may be deterred from committing new crimes by virtue of the fact that they are required to register. However, it is much more likely that any resultant deterrence stems from their original conviction and incarceration. However, the existence of a deterrent effect, in and of itself, does not render the statute punitive in nature. *State v. Burr*, 598 N.W. 2d 147, 154 (N.D. 1999); *State v. Ward*, 869 P.2d 1062, 1073 (Wash. 1994) 1073; *Kellar v. Fayetteville Police Department*, 5 S.W. 3d 402, 408 (Ark. 1999).

No affirmative disability or restraint is imposed by Missouri's sex offender registration scheme. Under the statute, registrants must provide fingerprints, a photograph and written identifying information concerning the offender and the details of the underlying sex offense. There are requirements to update information periodically, especially if the registrant moves. Those whose underlying crime involved a minor have to report more frequently. However, these requirements are not burdensome. Most of the information required in registration is the same as utilized during the court procedures for the underlying sex offense. There is no restriction on travel. Specific provisions exist to control circumstances wherein the registrant travels out of state. Thus, it is clearly contemplated by the

scheme that registrants will travel out of state. No impediment is placed upon such travel.

Registration poses no physical restraint. The Missouri scheme does not restrain activities sex offenders may pursue and leaves employment options unrestricted. To the extent that there occur restrictions upon available housing or jobs for sex offenders, it is a collateral consequence from the commission of the sex offense not from the registration. The availability of information concerning the sentence given the sex offender is a matter of public record in many instances. Plaintiff registered himself while on probation. The fact of his voluntary registration negates any argument he now makes that providing the same information that is already on the list again somehow violates his right to privacy.

Another significant *Kennedy v. Mendoza Martinez* factor examined in *Smith v. Doe* was whether the statute has a rational connection to a non-punitive purpose. Here, as with all of the sex offender registration schemes, there is a legitimate non-punitive purpose of public safety and protecting the welfare of children from sex offenders, which is advanced by alerting the public to the risk of sex offenders in their community. It is important to note that the statute does not have to be a perfect fit or narrowly drawn to accomplish the non-punitive aims it seeks to advance. It can still be considered to have a rational connection to its non-punitive goals.

It is not fatal to this determination that the Missouri scheme does not distinguish between sex offenders on the basis of their future dangerousness.

The United States Supreme Court has upheld against *ex post facto* challenge laws imposing regulatory burdens upon the class of sex offenders without any individual determination of future dangerousness. *DeVeau v. Braisted*, 363 U.S. 144, 160; 80 S.Ct. 1146 (1960); *Hawker v. New York*, 170 U.S. 189, 197 (1898). The relatively minor condition of registration does not require any individual determination of future dangerousness. Neither the duration of the reporting requirement or the potential for public dissemination of the information make the Missouri scheme excessive relative to their non-punitive purpose. In other words, registration is not so restrictive either in purpose or effect as to negate the legislature's intention to deem it civil and regulatory. The legislation does not have to prove to be the best method, only a reasonable one in light of the non-punitive objective. Missouri's legitimate need to protect public safety is of extreme importance, and the manner in which this goal is accomplished under the sex offender registration statutes is not excessive in relationship to its non-punitive purpose.

Ultimately, the focus of the *ex post facto* inquiry concerns whether the legislation alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995); *Collins v. Youngblood*, 497 U.S. 37 (1990). Plaintiff maintains that Missouri's Sex Offender Registration Act is "*ex post facto* in that it reaches back and penalizes appellant, based upon a crime which did not include this penalty at the time it was committed." (Appellant's Brief, 55). Plaintiff's guilty plea and sentencing belie the fallacy of his argument. During the sentencing,

Plaintiff acknowledged that he understood the registration requirement applied to him since his guilty plea occurred after its effective date. (Supplemental L.F., 22). At the time he evaluated his options as to whether to have a trial or plead guilty in exchange for a recommendation of probation and suspended imposition of sentence, he knew and understood that he would be required to register as a sex offender. He chose to accept that plea bargain and chose to register accordingly. The operative date in this analysis is, of course, the date he entered his plea. On the date he entered his plea, registration was the law. The fact that he has to register is a collateral consequence of his commission of illegal conduct constituting a sex offense.

The New Hampshire Court sitting en banc in *State v, Costello*, 643 A.2d 531 (N.H. 1994) rejected an *ex post facto* challenge to the constitutionality of that state's sex offender registration law. Relying on *Trop v. Dulles*, 356 U.S. 86 (1958), the court stated that "a statute is generally considered non-penal if it imposes a disability, not to punish but to accomplish some other legitimate governmental purpose. A statute that has both a penal and non-penal effect is nonetheless non-penal if that is the evident purpose of the legislature." *Costello*, 643 A.2d at 533.

In *Costello*, the defendant argued that he was being prosecuted for an act that was not illegal when the underlying crime was committed, as does the Plaintiff at bar. However, the court found this contention misconstrued the appropriate *ex post facto* analysis. The court stated that the defendant in *Costello* was in fact being prosecuted for an act, to wit: failure to register, that was in itself an

offense when defendant committed it, which in turn presented no problem of retrospective enforcement. *Costello*, at 533. The same analysis fits here and is dispositive of all issues in this case.

The Missouri sex offender registration statute meets all the tests set forth in *Smith v. Doe* to establish the legislation as regulatory and not punitive. Therefore, as discussed above, no violation of the *ex post facto* clause exists. Accordingly, the statutes are constitutional. It was appropriate for the Trial Court to deny injunctive and declaratory relief to Plaintiff since the application of the statutes did not constitute an *ex post facto* law as to him.

III. THE TRIAL COURT DID NOT ERR IN DENYING THE RELIEF REQUESTED BY PLAINTIFF IN HIS PETITION FOR DECLARATORY JUDGMENT AND PRELIMINARY AND PERMANENT INJUNCTION ON THE BASIS OF THE DOCTRINE OF EQUITABLE ESTOPPEL BECAUSE PLAINTIFF DID NOT ESTABLISH BY CLEAR AND SATISFACTORY EVIDENCE THAT THE ENFORCEMENT OF THE MISSOURI SEX OFFENDER REGISTRATION STATUTES, MO. REV. STAT. §§589.400 589.425, AGAINST HIM CONSTITUTED AN IMPERMISSIBLE RETROSPECTIVE APPLICATION OF LAW IN VIOLATION OF THE MISSOURI CONSITUTION, ARTICLE I, SECTION 13.

A. Equitable Estoppel

Plaintiff claims in his appellate brief that the doctrine of equitable estoppel should operate against the "State" to prevent the Missouri Sex Offender Registration Statutes from applying to him. (Appellant's Brief, 56-63). Plaintiff maintains that equitable estoppel should prevent the "State" from imposing new legal obligations upon him that constitute an impermissible retrospective application of law in violation of the Missouri Constitution, Article I, Section 13. (Appellant's Brief, 56-63).

Basically, Plaintiff claims that he was discharged from probation with a suspended imposition of sentence, which he maintains is a "closed record"

under the "Sunshine Laws" set forth in §610.120 RSMO 2000 (Cum. Supp. 2003). He believes that the obligation to register as a sex offender contained in RSMo. §589.400 *et seq*. imposes new legal obligations upon him in contravention to the promise he has from the "State" of privacy through completion of the probation associated with the suspended imposition of his sentence. His view is that the requirement of registration under these circumstances is an impermissible retrospective application of the law.

The doctrine of equitable estoppel is that rule of law that precludes one from denying his own expressed or implied admission that another person has in good faith acted upon. *Lake Saint Louis Community Ass'n v. Ravenwood Properties, Ltd*., 746 S.W. 2d 642 (Mo. App. 1988). According to his brief, Plaintiff believes that pursuant to his plea bargain with the "State", he received the right to a "closed record" and having performed the conditions of the plea bargain, the "State" should be forced to do the same. He essentially maintains that registration under the Sex Offender Registration Statutes denies him that "closed record." (Appellant's Brief, 62-63).

The defect in Plaintiff's argument is that the "State" is not a party to this case. Plaintiff has chosen to sue the county sheriff and the county prosecutor. He has not proven at trial any promises made by either of these two officials nor any admissions by members of their staff. At trial, Plaintiff proved he entered a plea bargain wherein he pled guilty in exchange for a certain sentence. (T. 6.). He also proved that the Court advised him his record would be "sealed" if

he completed probation. (T. 6.). He has not proven that any promises of the county prosecutor or sheriff have been broken or, more basically, that any promises were even made by the Defendants.

By his own facts, Plaintiff has demonstrated that he was not eligible for the extraordinary remedy of estoppel. Estoppel is to be applied with great care and caution in each case and only when all elements constituting estoppel clearly appear. *Resnick v. Blue Cross and Blue Shield of Missouri*, 912 S.W. 2d 567 (Mo. App. 1995). Estoppel is not favored in the law and should not be lightly invoked, as in this situation where the conduct complained of by Plaintiff was committed by someone other than the Defendants herein.

The Trial Court ruled that equitable relief was not warranted in this matter. There is substantial evidence to support the Trial Court's Judgment in that regard. Specifically, the testimony of Plaintiff is deficient to establish any promise by Defendants sufficient to support estoppel. Plaintiff did not prove any representations by anyone that relieved him of the obligation to register as a sex offender. In fact, Plaintiff proved the contrary. He proved that the Court ordered him to do so immediately in open court during the plea process. Plaintiff proved that he re-registered again shortly thereafter. (T. 8.) The Plaintiff is not factually entitled to the extraordinary remedy of estoppel.

The doctrine of equitable estoppel seeks to foreclose one from denying one's own expressed or implied admissions, which have in good faith been accepted and relied upon by another. There are three elements to a claim of

equitable estoppel: first, there must be an admission, statement or act by the person to be estopped that is inconsistent with the claim that is later asserted and sued upon; second, there must be action taken by a second party on the faith of such admission, statement or act; third, an injury must result to the second party if the first party is permitted to contradict or repudiate his admission, statement or act. Liberal application of the doctrine of equitable estoppel is not favored. Rather, it is restricted to use in only those cases in which each element clearly appears, with the burden resting on the party asserting estoppel to establish essential facts by clear and satisfactory evidence. *Lake Saint Louis Community Ass'n v. Ravenwood Properties, Ltd*., 746 S.W. 2d 642 (Mo. App. 1988); *Pinnell v. Jacobs*, 873 S.W. 2d 925 (Mo. App. 1994). Also, estoppel does not create a new right of any kind, but it is used as a means "to preserve rights already acquired." *State ex rel Liberty v. City of Pleasant Valley*, 453 S.W. 2d 700, 706 (Mo. App. 1970).

It is also important to note that when requesting estoppel from a governmental entity, not only must the traditional elements be shown, but also additional burdens must be overcome. Affirmative misconduct must be shown before the doctrine of equitable estoppel can be applied to governments. *Farmers and Laborers' Cooperative Insurance Ass'n v. Director of Revenue*, 742 S.W. 2d 141 (Mo. banc 1987). In that case, a mutual insurance company had not filed corporate income tax returns for many years, despite the fact that a change in the tax laws subjected such companies to taxation. The Director of Revenue had not enforced the law for approximately ten years, but notified companies of a change in

position and agreed to waive interest and penalties if the forms were filed by a certain date. Claimant asserted that the Director of Revenue should be estopped from action due to the long period of non-enforcement. The Court ruled that estoppel did not apply in that situation since the conduct of the Director of Revenue did not rise to the level of affirmative misconduct.

B. Retrospective Analysis

The Sex Offender Registration Act is not a prohibited retrospective law. The prohibition on retrospective laws applies when the law at issue impairs some vested right or affects past transactions to the substantial prejudice of a person. *La-Z-Boy Chair Co. v. Director of Economic Dev*., 983 S.W. 2d 523 (Mo. 1999). A vested right is one guaranteed by a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. *Fisher v. Reorganized School Dist. No. R-V,* 567 S.W. 647 (Mo. 1978). A vested right is something more than a mere expectation based upon a supposed continuation of past law. Additionally, a statute is not retrospective or retroactive because it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixed the status of an entity for the purpose of its operation. *Jerry-Russell Bliss, Inc., v. Hazardous Waste Mgt. Comm'n*, 702 S.W. 2d 77 (Mo. 1985).

To the extent that this Court wishes to analyze Plaintiff's retrospective argument, it should be guided by the case of *Corvera Abatement Technologies v. Air Conservation Comm'n*, 973 S.W. 2d 851 (Mo. banc 1998). *Corvera* concerned regulations governing asbestos abatement projects. The Air Conservation Commission promulgated certain regulations and then issued citations for infractions to Corvera, a company involved in the removal of asbestos. Corvera filed a petition for declaratory and injunctive relief against the Commission seeking to enjoin the Commission from enforcing the regulations as to it, claiming the regulations were void as retrospective legislation.

This Court found that the regulations were not retrospective as to Corvera in that they applied only to acts that occurred after enactment of the regulation. The same result is true in this case. Plaintiff's failure to register is conduct which occurred after the enactment of the Missouri Sex Offender Registration Law so it does not affect any of Plaintiff's past transactions and operates prospectively upon Plaintiff. Plaintiff incorrectly focuses upon the date he committed the underlying sex crime in 1994. (Appellant's Brief, 59).

The significant date in this analysis is the date he entered his plea of guilty in 1995, after the effective date of the Sex Offender Registration Act. The court that accepted his plea correctly required him to register at the time of the guilty plea. Plaintiff's decision not to register after he is discharged from probation is the conduct that subjects him to punishment under the Sex Offender Registration

Act. His conduct of failing to register clearly occurs after the effective date of RSMo. §589.400.

This Court goes on to state in the *Corvera* case that no one has a right to be free of enforcement of legislation for activities occurring after the legislation is enacted. *Corvera*, 973 S.W. 2d at 856. One does not have a vested right to insist that the law does not change. Neither persons nor entities have a vested right to insist that a law remain unchanged. *Fisher v. Reorganized School District No. R-V,* 567 S.W. 647, 649 (Mo. banc 1978). Plaintiff was subject to the registration requirement while on probation and continuing forward indefinitely.

Plaintiff has not demonstrated by clear and satisfactory evidence that he is entitled to equitable estoppel against a governmental entity because he does not prove any admissions of Defendants which are inconsistent with their current positions requiring his registration as a sex offender. As such, Plaintiff is not entitled to estoppel. Further, Plaintiff cannot show that the application of the Missouri Sex Offender Registration Act is an impermissible retrospective law as to him since the conduct it regulates is his failure to register, which clearly occurred after enactment of the legislation and does not affect his past transactions.

The Sex Offenders Registration Act applies to Plaintiff because of his past conviction of a sex offense. This application, however, neither deprives him or any vested right nor imposes upon him any new obligation based on a past event to their substantial prejudice. He is simply required to provide certain information to the Sheriff and then report periodically thereafter. He is not harmed

in any way. He is not denied income or employment nor deprived of any benefit otherwise available to him. He is not prevented from moving about or changing residence or domicile. The Sex Offender Registration Act merely fixes the status of persons to whom it applied based on their past criminal conduct. A statute may use antecedent facts to establish the status of those to whom it applies.

The Sex Offender Registration Act is forward looking. It applies if the offender has been convicted of or pled guilty to certain predicate offenses, which may be in the past prior to the enactment of the statute; yet the conduct regulated is the registration, which occurs after the enactment of the statute. In this case, both the triggering plea of guilty and the failure to register conduct occurred after the enactment of the Sex Offender Registration Act. Offenders are required to register and can be convicted of the crime of failing to register. It is registration that is the "transaction" controlled by the statute not the underlying sex offense. This premise is the most important one in this analysis. The Sex Offender Registration Act governs only those actions that occur after its enactment. Hence, it is not a retrospective law.

Plaintiff seems to make an argument that the Sex Offender Registration Act restricts his right to privacy and thereby acts retrospectively. (Appellant's Brief, 62). Plaintiff does not have a constitutional right to privacy with respect to prior convictions or guilty pleas as applied to sex offender registries. *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Russell v. Gregoire*, 124 F. 3d 1079 (9th Cir. 1997). Those persons who have pled guilty to a sex offense have a

reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. In this specific instance, there is no expectation of privacy since Plaintiff registered previously on the sex offenders list during his probation. According to his trial testimony, Plaintiff registered twice on the registry. (T. 7-8).

Plaintiff accuses the "State", which is not a defendant herein, of reaching back to deprive Plaintiff of the protection of RSMo. §610.105 through a law that did not exist when the crime was committed. (Appellant's Brief, 62-63.) It is again important to note that the Sex Offender Registration Act existed and was in effect when Plaintiff pled guilty. Plaintiff was advised about his responsibilities with regard to that law by the Court who took his plea, as follows:

> By the Court: "You understand that under a new law you will be, fall in the category of a prior sex offender; you know that?"
>
> By the Defendant/Appellant: "Yes, Your Honor."
>
> By the Court: "And you're required to be registered with the local sheriff's office, you understand that?
>
> By the Defendant/Appellant: "Yes, Your Honor."

(Supp. L.F. 22).

The date that is significant in this analysis is the plea date not the date of the commission of the crime. At the time he entered his plea, Plaintiff was fully apprised of his obligation to register under the Sex Offender Registration Act as a prior sex offender. He understood it and registered. His registration waived

any privacy interest he could have. It is a disingenuous argument to now claim that he expected not to have to continue to register at the conclusion of his probation because he was promised "privacy" through §610.105. To the extent that his plea of guilty is a "closed record" under §610.105, neither the Sheriff nor the Prosecutor herein have done anything improper with regard to disclosing or publishing the records regarding the plea.

CONCLUSION

This Court should avoid the constitutional questions raised by Appellant's Brief and decide this issue based upon the plain language of the statute just as the Trial Court did. There is substantial evidence to support the Trial Court's judgment in that the Plaintiff testified that he entered a guilty plea to a sex offense, which conduct triggers his obligation to register as a sex offender on Missouri's registry under the plain language of the Sex Offender Registration statutes set forth at §§589.400 – 589.425 Mo. Rev. Stat. (Cum. Supp. 2003). The application of the Sex Offender Registration Statutes to Plaintiff does not deny him due process of law because he received his procedural rights at the time he entered his plea. He received notification of his legal obligation to register as a sex offender during the plea of guilty, which safeguarded his due process rights. This analysis was recently espoused as the appropriate methodology in *Connecticut Department of Public Safety, et al v. John Doe*, 538 U.S. (2003), which is controlling here.

Utilizing traditional statutory construction principles and a plain meaning analysis, the Trial Court correctly determined the Missouri Sex Offender Registration Statutes apply to Plaintiff, and he is obligated to register or face criminal penalties for his failure to do so. The fact that the criminal record from his guilty plea may be a "closed record" under the Missouri Sunshine laws, RSMo. §610.105, does not affect the analysis in any way. The registry uses no official court records. A civil regulatory scheme enacted by the legislature known as the

Sex Offender Registration Act obligates Plaintiff to provide certain information regarding himself to the local county sheriff. None of the "closed records" from his plea are involved. Yet, because he pled guilty, he committed the conduct that triggers his duty to register. There is no conflict of statutes needing construction in this instance.

Plaintiff's complaint that the application of the Sex Offender Registration Statutes to him is an impermissible *ex post facto* law in violation of the constitutions of the United States and Missouri fails also. The United States Supreme Court reviewed the same type of a statute from Alaska recently in *Smith v. Doe*, 538 U.S. 84 (2003). The United States Supreme Court found the Alaska statute to be constitutional under an *ex post facto* challenge identical to the one made here. According to the Supreme Court's pronouncements in the *Smith v. Doe* case, the Missouri statutory scheme is a civil regulatory scheme that is non-punitive either in purpose or effect. As such, the Missouri scheme is not *ex post facto* as applied to Plaintiff, as the Trial Court correctly determined.

Additionally, Plaintiff did not demonstrate to the Trial Court by clear and satisfactory evidence that he is entitled to the extraordinary remedy of estoppel from a government entity. Plaintiff received a "closed record" of the official business of the court pursuant to plea bargain for a suspended imposition of sentence. His obligation to register under the civil regulatory sex offender registration scheme set forth in RSMo. §§589.400 – 589.425 is separate and distinct and does not impinge upon the "closed record" nature of the official court

records of his plea. Plaintiff's evidence established that he received exactly that for which he bargained. More importantly, his evidence established that neither of the Defendants, the county prosecutor and the county sheriff, made any promises or admissions to him that have been broken in any fashion. By his own evidence, Plaintiff established he was not eligible for the extraordinary remedy of estoppel.

Although this Court need not reach this issue, the Missouri Sex Offender Registration Statutes are not an impermissible retrospective law as applied to Plaintiff. No one has the right to be free from enforcement of legislation for activities that occurred after the legislation is enacted. *Corvera Abatement Technologies v. Air Conservation Comm'n*, 973 S.W. 851, 856 (Mo. banc 1998). Plaintiff's failure to register is conduct occurring after the enactment of the Missouri Sex Offender Registration Law so it does not affect any of Plaintiff's past transactions and operates prospectively upon Plaintiff. Plaintiff's focus on the date he committed the underlying crime in 1994 is erroneous. The correct conduct to evaluate is the current time when his obligation to register is ripe, and he has failed to do so. This Court should rule to require him to register as a sex offender with the county sheriff.

It is significant to recall that Plaintiff has already registered twice under the Sex Offender Registration Statutes. While he was on probation and under direct court supervision, hoping to receive a favorable discharge to earn himself the benefits of the suspended imposition of sentence, he registered.

Hence, whatever constitutional privacy rights he may have had are waived by his registration. This Court should require his re-registration currently and for the rest of his life under the plain terms of §589.400 et seq.

CERTIFICATION

Comes Now, Lisa Noel Gentleman, Deputy County Counselor, attorney of record for Respondents, Michael Sanders, the Jackson County Prosecuting Attorney and Tom Phillips, the Jackson County Sheriff, and pursuant to Missouri Supreme Court Rule 84.06, states the following required information:

1. The Respondents' Brief complies with the provisions of Missouri Supreme Court Rule 55.03;
2. The Respondents' Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b);
3. The name of the word processing software used to prepare Respondent's Brief is Microsoft Word 2000;
4. The diskette accompanying Respondent's Brief has been scanned and is virus free;
5. The number of words in Respondent's Brief is 11,490.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the above and forgoing Respondent's Brief were delivered this ___ day of June, 2004, to:

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